

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JON DEE MICAH PENNINGTON,

Applicant,

v.

Civ. 12-536 RB/GBW

UNITED STATES OF AMERICA,

Respondent.

**ORDER ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS AND
RECOMMENDED DISPOSITION**

This matter comes before the Court on Applicant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct a Sentence by a Person in Federal Custody. *Doc. 2.* Applicant argues that he suffered ineffective assistance of counsel because counsel failed to (1) object to the Presentence Investigation Report which he alleges incorrectly assessed him three criminal history points and (2) file a timely notice of appeal despite instructions to do so. *Id.*

The Magistrate Judge filed his Proposed Findings and Recommended Disposition (PFRD) on August 31, 2012. *Doc. 10.* He recommended dismissing the first claim because "Applicant has not established that any of his three criminal history points were incorrectly assessed." *Doc. 10* at 10. For the second claim, the Magistrate Judge found that "[b]ecause Applicant and Trial Counsel have offered contradictory affidavits regarding whether Applicant requested that Trial Counsel file an appeal on

his behalf, the Court cannot, without more, resolve the motion as to this issue." *Id.* at 7.

The Magistrate Judge therefore "conclude[d] that these facts require a limited evidentiary hearing" and recommended that the Court appoint counsel for Applicant for this claim. *Id.* at 7-8.

Applicant has filed no objections to the PFRD,¹ and, upon review of the record, I concur with the Magistrate Judge's findings and recommendations.

Wherefore, IT IS HEREBY ORDERED that the Magistrate Judge's Proposed Findings and Recommended Disposition, *doc. 10*, is ADOPTED. Applicant's claim regarding counsel's failure to object to the incorrect calculation of criminal history points is DISMISSED with prejudice. For the claim alleging failure to file an appeal despite instructions otherwise, the Magistrate Judge shall appoint counsel for Applicant, conduct an evidentiary hearing, and recommend a disposition.



ROBERT C. BRACK
UNITED STATES DISTRICT JUDGE

¹ The Court notes that the PFRD filed by the Magistrate Judge and mailed to the Applicant included Applicant's Presentence Report as an Exhibit. The exhibit, not the PFRD, was rejected and returned by the federal prison in which Applicant is housed because such reports are "not authorized" mail items. *See doc. 11*. Nonetheless, possession of the Exhibit was not necessary for the filing of meaningful objections to the PFRDs. Therefore, Applicant's failure to file such objections waives any review of the PFRD.